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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

JEROME M. WAGNER,

Plaintiff and Appellant,

v.

DIANA CRAMER,

Defendant and Respondent.

B208578

(Los Angeles County
Super. Ct. No. NWP014654)

APPEAL from a judgment of the Superior Court of Los Angeles County,
Michael R. Hoff, Judge. Affirmed.

Law Offices of Jerome M. Wagner and Jerome M. Wagner for Plaintiff and
Appellant.

Benton, Orr, Duval & Buckingham, Thomas E. Olson and Maureen M. Houska for
Defendant and Respondent.

Jerome M. Wagner, cotrustee of the Testamentary Trusts of James H. Davis, appeals from a judgment after a trial regarding beneficiary Diana Davis's (formerly Cramer) objections to a trust accounting and his removal as trustee. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

James H. Davis (Davis) died in October 1977. His will created two trusts benefitting his daughters Diana Davis (Diana) and Marsha Wagner (Marsha). The assets of the two trusts were combined in a single, unsegregated lump sum left by Davis to his daughters. The assets were to be administered together. Marsha's then-husband, Jerome M. Wagner (Wagner), drafted Davis's final will and was the executor. The decree of distribution named Wagner as sole trustee for the two trusts. Wagner and Marsha later divorced, and in 1983 the probate court ordered the appointment of a cotrustee, Nat Sherman.

On April 5, 2006, Wagner filed a petition for settlement of the 27th Annual Account for the period of January 1, 2005 through December 31, 2005 (2005 Accounting). The 2005 Accounting sought court approval of Wagner's activities and collection of fees.

Diana filed written objections which included the objection that Wagner was being paid concurrently both as a trustee and an attorney in violation of Probate Code section 15687,¹ that the trustees' fees were unreasonably high, given the nature of the trust, that the trustees had breached their duties of loyalty and to avoid conflicts of interest and acquisition of adverse interests in violation of sections 16002, 16004 and 16005 in connection with the trustees' investment of trust assets in Day-Mar Enterprises, in which Wagner was a general partner, and that the trustees had violated their duties of loyalty and impartiality to Diana under section 16003 because they had allowed a "disparity" to continue unaddressed.

¹ All subsequent statutory references are to the Probate Code.

The \$264,000 disparity had been created because, as permitted by the will, a large amount of the trust assets had been expended for the education of Marsha's (and Wagner's) four children, with no comparable expenditure being made on Diana's behalf. Diana's complaint was that Wagner refused to take steps thereafter to rebalance the accounts, resulting in a situation whereby Diana's trust allegedly was lending \$264,000 to Marsha's trust at a rate of 1.33 percent per annum, while Marsha's trust was earning 14 percent to 15 percent on this borrowed money through the trust's investments.

The trial court issued a proposed statement of decision on October 29, 2007, and after various objections by Wagner, entered judgment on May 9, 2008.

The judgment included the following pertinent findings:

"1. The collection of fees by [Wagner] as both attorney for the Trust and legal fees is a violation of section 15687. [¶] 2. [Wagner] has forfeited the right to fees by his mismanagement of the Trust and unequal treatment of the Beneficiaries. [¶] 3. [Wagner] has commingled non-trust property with Trust property, in violation of his duties under sections 16002, 16003, 16004 and 16005. [¶] 4. [Wagner] has permitted a disparity to exist between the beneficiaries without adequate steps to remedy the situation in violation of Probate Code section 16003. [¶] 5. Objector's objections to the accounting were based upon ample cause, and there was compelling evidence of the failure of Wagner to carry out his fiduciary duties as trustee. Therefore, the no contest clause of the will was not violated by filing objections. . . . [¶] . . . [¶] 7. The conduct of [Wagner] violated his duty as cotrustee and his conduct was willful and contrary to the best interests of the Trust and to at least one of the trust Beneficiaries."

The court removed Wagner as trustee of both trusts because of his breaches of fiduciary duty, and appointed a successor trustee.² It ordered Wagner to repay the trust for the fees collected during the accounting period. Finally, it ordered him to refrain from wasting trust assets.

Wagner filed a timely appeal.

² The order also removed Nat Sherman as cotrustee of the trusts, for health reasons.

DISCUSSION

I. Substantial evidence supported the trial court's finding that Wagner breached his duties as a trustee and that he should be removed as trustee.

We review for substantial evidence the trial court's finding that Wagner breached his duties as a trustee and that he should be removed as trustee. "[T]he power of an appellate court *begins and ends* with the determination as to whether, *on the entire record*, there is substantial evidence, contradicted or uncontradicted, which will support the determination, and when two or more inferences can reasonably be deduced from the facts, a reviewing court is without power to substitute its deductions for those of the trial court.'" (*Applera Corp. v. MP Biomedicals, LLC* (2009) 173 Cal.App.4th 769, 788.) We find that substantial evidence supports the court's finding.

The court properly could have based its finding that Wagner breached his duties on his concurrent payment to himself of both attorney's fees and trustee's fees in violation of section 15687. There is no dispute that he did so, not only during the period encompassed by the 2005 Accounting, but also for many years preceding the 2005 Accounting. This supplies substantial evidence to support the judgment.

It is unnecessary to determine the basis for the court's other findings because substantial evidence supported the trial court's removal of Wagner irrespective of other improper conduct, if any. (See *Schwartz v. Labow* (2008) 164 Cal.App.4th 417, 427, quoting § 17206 [court has "wide, express powers to 'make any orders and take any other action necessary or proper to dispose of the matters presented' by the section 17200 petition."].)

II. The trial court did not abuse its discretion in disapproving Wagner's fees.

The court refused to approve Wagner's fees and ordered that they be returned. We review rulings on requests for trustee's fees to determine whether the trial court abused its discretion. (*Finkbeiner v. Gavid* (2006) 136 Cal.App.4th 1417, 1422.) In light of the record before us and our determination in the preceding section, we find no abuse of discretion. The trial court was within its authority and discretion to refuse to approve the fees and order their return. (See § 16420, subs. (a)(3), (a)(7), (a)(6), (a)(9) & (b).)

III. The trial court did not err in removing Wagner as the trustee of both trusts.

Wagner argues that the judgment should apply only to the trust of the objector, Diana. Because Marsha did not join in Diana's objections, Wagner argues that he should continue as the trustee with respect to Marsha's trust. We review legal questions de novo (*Hernandez v. County of Los Angeles* (2008) 167 Cal.App.4th 12, 18), and reject Wagner's argument.

Section 15642 allows the court to remove a trustee on its own motion. Thus, no action by Marsha was required to remove Wagner as her trustee.

In addition, the court has an independent duty to supervise the activities of trustees. "Presented with a section 17200 petition to settle an account, 'the probate court has a duty *imposed by law* to inquire into the prudence of the trustee's administration.'" (*Schwartz v. Labow, supra*, 164 Cal.App.4th at p. 427, italics in original.)

In this case, the matter before the court concerned the assets of both Diana's and Marsha's trusts. Wagner's petition for approval of the 2005 Accounting did not distinguish between Diana's and Marsha's trusts. It presented consolidated schedules as to both "consistent with the requirements that said trusts be accounted for separately, but without physical segregation of assets." Wagner's petition by its terms submitted himself, as trustee of *both* trusts, to the jurisdiction of the probate court, and "triggered the probate court's duty to scrutinize the prudence of his administration" of both trusts. (*Schwartz v. Labow, supra*, 164 Cal.App.4th at p. 428.)³

In fulfilling its duty to inquire into the prudence of the trustee's administration of both trusts, the court uncovered evidence that Wagner was breaching his duties to Marsha as well as to Diana by his concurrent charging of both attorney's fees and trustee's fees to her trust in violation of section 15687. The court therefore had the power to protect Marsha's trust, as well as Diana's, from Wagner's violation of section 15687, and to

³ Wagner testified that "[t]he testamentary document refers to the creation of two separate trusts, the Diana and the Marsha. However, the assets, it provided there's no need to segregate assets. And, in fact, it was created, and the word in the initiating document is 'Trust,' singular. So it was treated as a singular trust with two de facto beneficiaries: One, Diana . . . and the other, Marsha."

remove Wagner as trustee, regardless of whether Marsha filed an objection to the accounting.

Finally, Wagner's argument that he should remain as Marsha's trustee is impractical. Given the structure of the trusts, which combined Marsha's and Diana's assets and provided for their administration as a single entity, it is not feasible for Wagner to manage some of the combined assets and a third party to manage the remainder.

IV. The trial court acted within its discretion in appointing an independent trustee.

Wagner argues that the trial court was required to appoint Robert S. Scuderi to succeed him as trustee, citing the provision in Davis's 1977 will (drafted by Wagner), which provided that if Wagner "shall for any reason fail to qualify or cease to act as Trustee, I appoint ROBERT S. SCUDERI, as successor Trustee." Scuderi was Wagner's law partner at the time probate closed. Wagner testified at trial that Scuderi was "my lawyer partner, with whom I have a very close relationship," and that Scuderi was a general partner in two of the three properties owned in the trust, H-Inland Enterprises and Franklin Canyon.

The trial court was "[e]quipped with broad, express and inherent powers to take any action necessary to dispose of matters presented by the petition." (*Schwartz v. Labow, supra*, 164 Cal.App.4th at p. 428.) Given the red flags raised by the 2005 Accounting, Wagner's close business and personal relationship with Scuderi, and the fact that Scuderi was a general partner responsible for management of two of the trust properties, the trial court's decision to appoint an independent trustee was within its "wide, express powers to 'make any orders and take any other action necessary or proper to dispose of the matters presented' by the section 17200 petition." (*Id.* at p. 427, quoting § 17206.)

V. The prohibition against collecting attorney's fees and trustee's fees simultaneously without court approval cannot be waived.

Section 15687 provides that an attorney serving as a trustee is prohibited from receiving trustee's compensation and legal fees simultaneously "unless the trustee obtains

approval for the right to dual compensation” by either an order of the court or 30 days’ advance written notice and opportunity to object. There was no court order and no written notice in connection with the 2005 Accounting.

Wagner claims that, because the beneficiaries did not complain that he was collecting attorney’s fees and trustee’s fees simultaneously without court approval in violation of section 15687, Diana waived any objection to his collection of dual fees. He also argues in essence that, because the court had approved prior accounts in which he had impermissibly collected both trustee’s and attorney’s fees, the court had waived any objection to this illegal practice or implicitly approved it.

Wagner’s arguments are unsupportable as a matter of law. The statute expressly provides “[a]ny waiver of the requirements of this section is against public policy and shall be void.” (§ 15687 subsection (e).) Wagner collected dual compensation in violation of the statute, Diana did not waive the right to object, and the trial court’s determination was correct.

VI. Diana’s objections did not violate the will’s “no contest” clause.

Wagner argues that Diana’s objection to the Day-Mar Enterprises purchase violates the no contest clause in the 1977 will, which provides “[i]f any beneficiary, devisee or legatee under this Will . . . shall contest this Will or Trust or attack or seek to impair or invalidate any of its provisions . . . in that event I specifically disinherit each such person”

The “no contest clause” is made inapplicable here by section 21307, which provides “[a] no contest clause is not enforceable against a beneficiary to the extent the beneficiary, with probable cause, contests a provision that benefits . . . (a) [a] person who drafted or transcribed the instrument.” Wagner drafted the will and the court had ample basis for finding that Diana had probable cause. Wagner received benefits in the form of

trustee's fees and attorney's fees. Therefore, Wagner cannot enforce the no contest provision against Diana.⁴

Even setting aside section 21307, and assuming that this provision in the will had any application to a beneficiary's objection to a trustee's alleged conflict of interest and self-dealing with trust assets almost 30 years later, Diana's objection to Wagner's conduct in connection with Day-Mar Enterprises did not in any sense seek to "impair or invalidate any . . . provision[]" of the will or the trusts. It addressed Wagner's alleged misconduct in acting as trustee. The will and trust did not authorize misconduct by the trustee.

Wagner also argues that Diana violated the no contest clause by objecting to the treatment of trust assets that were spent disproportionately on the education of Marsha and Wagner's four children.⁵ Diana's objection to Wagner's accounting did not attack the provision in the will that allowed disproportionate expenditures. Rather, it sought relief from Wagner's alleged disinclination to address the disparity, which resulted in what Diana characterizes as "loans from the Diana trust to the Marsha trust . . . at extremely low rates." This objection, like the objection concerning breaches of duty in connection with the Day-Mar Enterprises investment, does not violate the no contest provision in the will.

⁴ Wagner also argues that Diana failed to file a petition for "safe harbor" under Probate Code section 21320, subdivision (a), but that provision is permissive, not mandatory ("a beneficiary *may* apply to the court for a determination whether a particular . . . act by the beneficiary . . . would be a contest," italics added).

⁵ Wagner adopted two of Marsha's children and the couple adopted two more during their marriage.

DISPOSITION

We affirm the judgment. Diana is entitled to her costs on appeal.

NOT TO BE PUBLISHED.

MILLER, J.*

We concur:

MALLANO, P. J.

ROTHSCHILD, J.

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.